

THE PUBLIC
COMPETITION
ENFORCEMENT
REVIEW

ELEVENTH EDITION

Editor
Aidan Synnott

THE LAWREVIEWS

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CONTENTS

PREFACE.....	vii
<i>Aidan Synnott</i>	
Chapter 1 EU OVERVIEW.....	1
<i>Frédéric Louis and Anne Vallery</i>	
Chapter 2 ARGENTINA.....	8
<i>Miguel del Pino and Santiago del Rio</i>	
Chapter 3 BELGIUM.....	20
<i>Hendrik Viaene</i>	
Chapter 4 BRAZIL.....	30
<i>Mariana Villela, Leonardo Maniglia Duarte, Gabriela Reis Paiva Monteiro and Vinicius da Silva Cardoso</i>	
Chapter 5 CANADA.....	43
<i>Michael Koch, David Rosner and Justine Johnston</i>	
Chapter 6 CHINA.....	54
<i>Michael Gu</i>	
Chapter 7 COLOMBIA.....	68
<i>Enrique Álvarez and Darío Cadena</i>	
Chapter 8 CYPRUS.....	83
<i>Stephanos Mavrokefalos</i>	
Chapter 9 FINLAND.....	90
<i>Tapani Manninen, Anette Laulajainen and Meri Vanhanen</i>	
Chapter 10 FRANCE.....	102
<i>Olivier Billard</i>	

Contents

Chapter 11	GERMANY.....	114
	<i>Evelyn Niitväli and Marc Reysen</i>	
Chapter 12	GREECE.....	127
	<i>Emmanuel Dryllerakis and Cleomenis Yannikas</i>	
Chapter 13	INDIA.....	147
	<i>Sagardeep Rathi, Anisha Chand and Ebaad Nawaz Khan</i>	
Chapter 14	INDONESIA.....	168
	<i>Farid Fauzi Nasution, Anastasia Pritabayu RD and Berla Wahyu Pratama</i>	
Chapter 15	ITALY.....	178
	<i>Giuseppe Scassellati-Sforzolini, Marco D'Ostuni, Luciana Bellia, Fabio Chiovini and Michael Tagliavini</i>	
Chapter 16	JAPAN.....	188
	<i>Junya Ae, Michio Suzuki and Ryo Yamaguchi</i>	
Chapter 17	MEXICO.....	199
	<i>Luis Gerardo García Santos Coy, Carlos Mena-Labarthe and Sara Gutiérrez Ruiz de Chávez</i>	
Chapter 18	NETHERLANDS.....	212
	<i>Iradj Nazaryar and Tjarda van der Vijver</i>	
Chapter 19	NORWAY.....	223
	<i>Odd Stemsrud</i>	
Chapter 20	POLAND.....	235
	<i>Anna Laszczyk and Wojciech Podlasin</i>	
Chapter 21	PORTUGAL.....	246
	<i>Joaquim Caimoto Duarte and Tânia Luísa Faria</i>	
Chapter 22	SOUTH AFRICA.....	263
	<i>Candice Upfold</i>	
Chapter 23	SWEDEN.....	288
	<i>Peter Forsberg, Johan Holmquist and David Olander</i>	

Contents

Chapter 24	TAIWAN.....	298
	<i>Stephen Wu, Rebecca Hsiao and Wei-Han Wu</i>	
Chapter 25	TURKEY.....	322
	<i>Serbüilent Baykan</i>	
Chapter 26	UNITED KINGDOM.....	334
	<i>Marc Israel, Sophie Sablin and Arthur Henderson</i>	
Chapter 27	UNITED STATES.....	351
	<i>Aidan Synnott and William B Michael</i>	
Chapter 28	VENEZUELA.....	371
	<i>Alejandro Gallotti</i>	
Appendix 1	ABOUT THE AUTHORS.....	381
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	399

PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the *Autorité de la Concurrence* and the *Bundeskartellamt* concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny

by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different *Luxottica* deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

Aidan Synnott

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

April 2019

UNITED STATES

Aidan Synnott and William B Michael¹

I OVERVIEW

In 2018, the United States Federal Trade Commission (FTC) regained its full slate of five commissioners, as Chairman Joseph J Simons and Commissioners Noah Joshua Phillips, Rohit Chopra, Rebecca Kelly Slaughter and Christine S Wilson were sworn in. In September, the FTC began holding a series of wide-ranging public hearings on a number of important competition and consumer protection topics, including merger enforcement and competitive issues related to technology and digital platforms. These hearings have the potential to inform the FTC's approach to enforcement for years to come. Meanwhile, the leadership of the Antitrust Division of the United States Department of Justice (DOJ) has been vocal in setting forth its views in a number of areas which we discuss below, including competitive issues related to patent licensing, merger review processes and merger remedies.

The agencies continued to investigate numerous mergers, settling several investigations with divestiture remedies and litigating others (most notably AT&T's acquisition of Time Warner). The DOJ continued aggressively to pursue price-fixing investigations in several industries, including London Interbank Offered Rate (LIBOR), foreign exchange markets, e-commerce, auto parts, electrolytic capacitors, packaged seafood and generic drugs. It also pursued bid-rigging investigations in real estate foreclosure auctions, ocean shipping and various other areas. The agencies were also involved in matters involving pharmaceutical 'pay for delay' allegations, 'steering' restrictions and market allocation.

The agencies' attention to international matters also continued. Both the FTC and DOJ participated in several international meetings and conferences, including meetings with enforcers from the European Union and China, and meetings of the International Competition Network. In a late summer speech, the head of the Antitrust Division noted that 'international engagement and global dialogue [are] . . . of significant importance to' him. He also reported on efforts related to the DOJ's Multilateral Framework on Procedure in Competition Law Investigation and Enforcement initiative, which seeks international agreement on procedural norms, noting 'that the areas of consensus far outweigh those that require additional discussion.'²

1 Aidan Synnott and Bill Michael are partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors thank Maxwell Kosman, Mark R Laramie and Jonathan Silberstein-Loeb for their invaluable assistance in preparing this chapter.

2 Makan Delrahim, 'Come Together': Victories and New Challenges for the International Antitrust Community, 6 September 2018, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-45th-annual-fordham-conference>.

II CARTELS

i Significant cases

LIBOR

The DOJ's long-running investigation of LIBOR and other interbank offered rates continued, with two significant developments in 2018. First, in June 2018, the DOJ entered into a deferred prosecution agreement with Société Générale SA, pursuant to which Société Générale admitted that, between May 2010 and at least October 2011, the company promulgated falsely deflated US dollar LIBOR submissions in order to project a false image of the bank's health.³ By the terms of the agreement, Société Générale paid a LIBOR-related fine of US\$275 million.⁴ Second, in October 2017, a former supervisor of Deutsche Bank's Pool Trading Desk and a former derivatives trader were convicted in the Southern District of New York of conspiracy and wire fraud for their participation in a scheme to manipulate LIBOR.⁵

Foreign exchange markets

There were also several developments in the DOJ's long-running investigation into alleged collusion with respect to foreign currency exchange (FX). In January 2018, BNP Paribas USA (BNPP USA) pleaded guilty to participating in a price-fixing conspiracy in the FX market.⁶ According to the court papers, BNPP USA conspired to fix prices in Central and Eastern European, Middle Eastern and African (CEEMA) currencies.⁷ In May 2018, a former currency trader from a US-based financial institution was indicted for allegedly conspiring to fix prices and rig bids and offers in CEEMA currencies.⁸ And in October 2018, three London-based traders, who were members of a chatroom that was at one point called the 'cartel', were acquitted after a three-week trial in New York in which they were alleged to have conspired to fix prices in the foreign exchange market.⁹

E-commerce

The DOJ carried forward its prosecution of price-fixing conduct in the e-commerce sphere. The former director and part owner of Trod Limited had previously been indicted for conspiring to fix the prices of posters sold online.¹⁰ A UK resident, he remained a fugitive

3 Press release, 'Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate', available at <https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan>.

4 Id.

5 Press release, 'Two Former Deutsche Bank Traders Convicted for Role in Scheme to Manipulate a Critical Global Benchmark Interest Rate', available at <https://www.justice.gov/opa/pr/two-former-deutsche-bank-traders-convicted-role-scheme-manipulate-critical-global-benchmark>.

6 Press release, 'BNP Paribas USA Inc. Pleads Guilty to Antitrust Conspiracy', available at <https://www.justice.gov/opa/pr/bnp-paribas-usa-inc-pleads-guilty-antitrust-conspiracy>.

7 Id.

8 Press release, 'Former Currency Trader Indicted for Participating in Antitrust Conspiracy', available at <https://www.justice.gov/opa/pr/former-currency-trader-indicted-participating-antitrust-conspiracy>.

9 Lindsay Fortado, et al, 'Bank traders acquitted in forex manipulation trial', *Financial Times* (26 October 2018), available at <https://www.ft.com/content/1e192f6e-d7a5-11e8-a854-33d6f82e62f8>.

10 Press release, 'Former E-Commerce Executive Pleads Guilty to Price Fixing; Sentenced to Six Months', available at <https://www.justice.gov/opa/pr/former-e-commerce-executive-pleads-guilty-price-fixing-sentenced-six-months>.

until his arrest in May 2018.¹¹ In January 2019, he pleaded guilty, and will serve a custodial sentence of six months, with credit for the time served in Spanish custody.¹² Also in January 2019, a federal grand jury in Houston returned an indictment against Taiwan-based G Nova corporation and its CEO for participating in a conspiracy to fix prices of Koozies, and the DOJ announced that it had filed criminal charges against Netbrands Media Corporation and two executives for their roles in a separate conspiracy to fix prices of wristbands, lanyards, temporary tattoos and buttons sold in the United States.¹³ Netbrands and the executives all agreed to plead guilty or entered guilty pleas. Speaking of these developments, Assistant Attorney General Delrahim said:

*The results announced today are the latest in a series of charges against eleven defendants filed in the Division's ongoing investigation into conspiracies that corrupted the online marketplace and deprived consumers of the benefits of competition . . . Whether the conspiracy takes place in smoke-filled rooms that are real or virtual, the Department of Justice and its law enforcement partners are committed to uncovering and prosecuting collusion.*¹⁴

Auto parts

The now nine-year DOJ investigation into auto part prices carried on into 2018. In May 2018, Maruyasu Industries Co Ltd (Maruyasu) agreed to plead guilty and pay a US\$12 million criminal fine for its role in a conspiracy to suppress and eliminate competition by agreeing to fix prices, allocate customers and rig bids for automotive steel tubes.¹⁵ Concurrent with the Court's imposition of the sentence against Maruyasu, the DOJ moved to dismiss the indictments against Maruyasu's US subsidiary and three Maruyasu sales executives.¹⁶ As of 31 May 2018, and including Maruyasu, the Antitrust Division's prosecution of collusion in the auto parts industry has resulted in more than US\$2.9 billion in fines, and the convictions of 46 corporations and 32 executives.¹⁷

Electrolytic capacitors

The DOJ's pursuit of charges in connection with price fixing, bid rigging and other anticompetitive conduct in the electrolytic capacitors industry continued, but slowed slightly, in 2018. Electrolytic capacitors store and regulate electrical currents in a variety of electronic products, including computers, televisions, car engine and airbag systems, home appliances and office equipment. The government resolved several cases in this investigation in 2018.

11 Id.

12 Id.

13 Press release, 'Justice Department Announces Multiple Charges for Price-Fixing Conspiracies in Customized Promotional Products Industry', available at <https://www.justice.gov/opa/pr/justice-department-announces-multiple-charges-price-fixing-conspiracies-customized>.

14 Id.

15 Press release, 'Japanese Auto Parts Company Pleads Guilty to Antitrust Conspiracy Involving Steel Tubes', available at <https://www.justice.gov/opa/pr/japanese-auto-parts-company-pleads-guilty-antitrust-conspiracy-involving-steel-tubes>.

16 Id.

17 Id.

Packaged seafood

The DOJ continued its antitrust investigation in the packaged seafood industry. In May, a federal grand jury returned an indictment against the President and CEO of Bumble Bee Foods LLC, alleging that he participated in a conspiracy involving prices of packaged seafood from November 2010 to December 2013.¹⁸ He was the fourth individual charged in the ongoing investigation.¹⁹ In October 2018, StarKist Co pleaded guilty to a one-count felony charge for its role in the alleged conspiracy, exposing it to a potential criminal fine of up to US\$100 million.²⁰ It was the second organisation to plead guilty in connection with the DOJ's investigation.²¹

Generic drugs

The DOJ has publicly stated that the Antitrust Division's investigation into potential collusion and market allocation in the generic pharmaceutical industry is 'ongoing'.²² In December 2018, an Assistant Attorney General for the State of Connecticut said that state attorneys general were also involved in an investigation of alleged price fixing in the generics industry involving 'at least 16 companies and 300 drugs'.²³

Bid rigging

Defence fuel supply contracts

In November 2018, three South Korean-based companies – SK Energy Co Ltd, GS Caltex Corporation, and Hanjin Transportation Co Ltd – pleaded guilty to criminal charges, and agreed to collectively pay US\$82 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to the US Army, Navy, Marine Corps and Air Force bases in South Korea.²⁴ In particular, the three filed felony charges allege that beginning at least in or around March 2005, and continuing into 2016, South Korean petroleum and refinery companies 'participated in a combination and conspiracy to suppress and eliminate competition during the bidding process for . . . fuel supply contracts' pertaining to the numerous US military bases throughout South Korea.²⁵ The DOJ stated that the charges are part of 'an ongoing federal investigation'.²⁶ The Antitrust

18 Press release, 'Bumble Bee CEO Indicted for Price Fixing', available at <https://www.justice.gov/opa/pr/bumble-bee-ceo-indicted-price-fixing>.

19 Id.

20 Press release, 'StarKist Co. Agrees to Plead Guilty for Price Fixing', available at <https://www.justice.gov/opa/pr/starkist-co-agrees-plead-guilty-price-fixing>.

21 Id.

22 Department of Justice, A Prescription For Competition—Remarks as Prepared for the Antitrust in Healthcare Conference, available at <https://www.justice.gov/opa/speech/file/1064081/download>.

23 Christopher Rowland, Investigation of generic 'cartel' expands to 300 drugs, *Washington Post* (9 December 2018), available at https://www.washingtonpost.com/business/economy/investigation-of-generic-cartel-expands-to-300-drugs/2018/12/09/fb900e80-f708-11e8-863c-9e2f864d47e7_story.html?noredirect=on&utm_term=.1a1f746dfc45.

24 Press release, 'Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts', available at <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>.

25 Id.

26 Id.

Division also filed a civil antitrust complaint against the same defendants, and, at the same time, proposed settlement that, if approved by the court, would resolve that lawsuit.²⁷ The aggregate settlements would exceed US\$150 million.²⁸ The litigation resulted from a whistle-blower action.²⁹

Real estate foreclosure auctions

The DOJ continued to aggressively investigate bid rigging and fraud in public foreclosure auctions, bringing charges or securing guilty pleas in 2018 against individuals in California,³⁰ Mississippi³¹ and Florida.³²

The charges allege that the defendants conspired among themselves and with others not to bid against one another, and to designate winning bidders for properties at public real estate foreclosure auctions conducted both in-person and online.³³ In many cases, the real estate properties bought at non-competitive prices were then awarded to the conspirators who submitted the highest bids at a second, private auction.³⁴ Because the proceeds of the original real estate auctions are used to pay off the mortgage and other debt attached to a property, with the remaining proceeds being paid to the homeowner, the conspirators paid and received money that otherwise would have gone to pay off the mortgage and other debt and, in some cases, the defaulting homeowner.³⁵ As of November 2018, over 100 individuals had been convicted or pleaded guilty for rigging public mortgage foreclosure auctions in six different states.³⁶

27 Id.

28 Id.

29 Id.

30 Press release, 'Real Estate Investor Sentenced to 30 Months in Prison for Rigging Bids at Northern California Public Foreclosure Auctions', available at <https://www.justice.gov/opa/pr/real-estate-investor-sentenced-30-months-prison-rigging-bids-northern-california-public>; Press release, 'Five Real Estate Investors Sentenced for Rigging Bids at Northern California Public Foreclosure Auctions', available at <https://www.justice.gov/opa/pr/five-real-estate-investors-sentenced-rigging-bids-northern-california-public-foreclosure>.

31 Press release, 'Mississippi Real Estate Investors Plead Guilty to Conspiracy to Rig Bids at Public Foreclosure Auctions', available at <https://www.justice.gov/opa/pr/mississippi-real-estate-investors-plead-guilty-conspiracy-rig-bids-public-foreclosure>; Press release, 'Seventh Mississippi Real Estate Investor Pleads Guilty to Conspiring to Rig Bids at Public Foreclosure Auctions', available at <https://www.justice.gov/opa/pr/seventh-mississippi-real-estate-investor-pleads-guilty-conspiring-rig-bids-public-foreclosure>; Press release, 'Two Additional Mississippi Real Estate Investors Plead Guilty to Conspiracy to Rig Bids at Public Foreclosure Auctions', available at <https://www.justice.gov/opa/pr/two-additional-mississippi-real-estate-investors-plead-guilty-conspiracy-rig-bids-public>.

32 Press release, 'Real Estate Investor Pleads Guilty to Bid Rigging at Online Auctions', available at <https://www.justice.gov/opa/pr/real-estate-investor-pleads-guilty-bid-rigging-online-auctions>; Press release, 'Real Estate Investor Pleads Guilty to Bid Rigging at Online Auctions', available at <https://www.justice.gov/opa/pr/real-estate-investor-pleads-guilty-bid-rigging-online-auctions>.

33 See footnotes 30 to 32.

34 Id.

35 Id.

36 Press release, 'Third Real Estate Investor Pleads Guilty to Bid Rigging in Florida Online Foreclosure Auctions', available at <https://www.justice.gov/opa/pr/third-real-estate-investor-pleads-guilty-bid-rigging-florida-online-foreclosure-auctions>.

Foreclosed home repair

The DOJ continued its investigation into fraud and kickbacks relating to repair contracts in the Minneapolis area. In August 2018, a federal grand jury returned an indictment against a real estate company, and a realtor and his accountant for participating in a ‘conspiracy to defraud companies, including financial institutions, in connection with foreclosed properties’.³⁷ The indictment alleges that defendants devised a scheme requiring repair contractors to pay kickbacks in return for the steering of housing repair contracts to the contractors who paid the kickbacks. This is the second case involving this type of conduct.

Ocean shipping

There were no significant public developments in the DOJ’s investigation into the alleged conspiracy to fix prices, allocate customers and rig bids for international ocean shipping services for roll-on, roll-off cargo such as cars, trucks and agricultural equipment to and from the United States and elsewhere.³⁸ As of September 2017 a total of five companies had pleaded guilty in the investigation, resulting in criminal fines of over US\$255 million.³⁹ Four executives had also pleaded guilty, and an additional seven had been indicted.⁴⁰

Public school bus auction

In February 2018, four owners of school bus transportation companies were sentenced for participating in bid rigging and fraud conspiracies related to school bus transportation contracts in Puerto Rico.⁴¹ The four individuals had been convicted after trial in 2017.⁴² The convictions arose from a federal antitrust investigation being conducted by the Antitrust Division, the District of Puerto Rico US Attorney’s Office, the FBI’s Puerto Rico Field Office and the US Department of Education Office of Inspector General.⁴³

37 Press release, ‘Minnesota Real Estate Company, Realtor, and Accountant Indicted for Mail and Wire Fraud Scheme Affecting U.S. Financial Institutions’, available at <https://www.justice.gov/opa/pr/minnesota-real-estate-company-realtor-and-accountant-indicted-mail-and-wire-fraud-scheme>.

38 Press release, ‘International Shipping Executives Indicted for Colluding on Bids and Rates’, available at <https://www.justice.gov/opa/pr/international-shipping-executives-indicted-colluding-bids-and-rates>; Press release, ‘Norwegian Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks’, available at <https://www.justice.gov/opa/pr/norwegian-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>.

39 Press release, ‘Norwegian Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks’, available at <https://www.justice.gov/opa/pr/norwegian-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>.

40 Id.

41 Press release, ‘School Bus Company Owners Sentenced to Prison for Bid Rigging and Fraud Involving Puerto Rico Public School Bus Services’, available at <https://www.justice.gov/opa/pr/four-school-bus-company-owners-sentenced-jail-bid-rigging-and-fraud-involving-puerto-rico>.

42 Press release, ‘Four School Bus Company Owners Convicted for Bid Rigging and Mail Fraud Conspiracies Involving Puerto Rico Public School Bus Services’, available at www.justice.gov/opa/pr/four-school-bus-company-owners-convicted-bid-rigging-and-mail-fraud-conspiracies-involving.

43 Id.

Freight forwarding

Two executives were arrested on and then pleaded guilty to charges that they orchestrated a nationwide conspiracy to fix prices for international freight forwarding services.⁴⁴ According to the indictment and their guilty pleas, the conspiracy lasted from at least September 2010 to March 2015.⁴⁵ The two individuals – the first to be convicted in the investigation – have agreed to cooperate in the ongoing investigation into price fixing in the international freight forwarding industry, which is being conducted by the Antitrust Division, the FBI's International Corruption Unit and the FBI's New Orleans Division.⁴⁶

Anti-poaching

In April 2018 the DOJ reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world's largest rail equipment suppliers, to resolve a civil lawsuit alleging that the companies had maintained unlawful agreements not to compete for each other's employees.⁴⁷ The DOJ alleged that Knorr and Wabtec 'compete with each other to attract, hire, and retain various skilled employees,' and that the companies had 'reached agreements not to solicit, recruit, hire without prior approval, or otherwise compete with one another for employees.'⁴⁸ The settlement prohibits Knorr and Wabtec 'from entering, maintaining, or enforcing no-poach agreements with any other companies, subject to limited exceptions.'⁴⁹

Heir-location services firms

In 2018, litigation pertaining to the criminal heir-location services trial continued. As background, in August 2017, the United States District Court for the District of Utah dismissed bid-rigging charges against a Salt Lake City-based heir-location services provider and its co-owner.⁵⁰ The defendants had been charged with violating Section 1 of the Sherman Act for allocating customers with another heir-location services firm.⁵¹ The Court ruled that the conspiracy had effectively ceased in July 2008, and that the prosecution was therefore barred by the statute of limitations.⁵² On 22 December 2017, the DOJ appealed the Court's ruling to the United States Court of Appeals for the Tenth Circuit.⁵³ In October 2018, the Tenth Circuit ruled that the case did not fall outside the statute of limitations, while at the

44 Press release, 'Two Freight Forwarding Executives Plead Guilty To Fixing Prices', available at <https://www.justice.gov/opa/pr/two-freight-forwarding-executives-plead-guilty-fixing-prices>.

45 Id.

46 Id.

47 Press release, 'Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees', available at <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.

48 Id.

49 Id.

50 Memorandum Decision and Order, *United States v. Kemp Assoc Inc*, 2017 WL 3720695 (28 August 2017).

51 Press release, 'Heir Location Services Company and Co-Owner Charged with Customer Allocation Scheme', available at www.justice.gov/opa/pr/heir-location-services-company-and-co-owner-charged-customer-allocation-scheme.

52 'Brian Koenig, 'Heir Locator's Anti-Per Se Arguments Already Rejected: DOJ' (11 January 2019), Law360, available at <https://www.law360.com/articles/1117470/heir-locator-s-anti-per-se-arguments-already-rejected-doj>.

53 Id.

same time declining to reverse the district court's decision tying the case to a rule-of-reason standard. In January 2019, the DOJ sought reconsideration of the district court's prior ruling that the court should be evaluated as a rule of reason (rather than *per se*) case. The issue is significant, as DOJ policy only permits prosecutors to pursue as criminal cases those subject to the *per se* standard.⁵⁴ The district court granted the DOJ's motion for reconsideration on 21 February 2019, holding that the charged conduct is indeed to be tried under the *per se* approach.⁵⁵

Water treatment chemicals

The DOJ continued its investigation into alleged collusion to circumvent competitive bidding and independent pricing for liquid aluminium sulphate contracts. In January 2018, a former executive pleaded guilty for his role in a conspiracy to eliminate competition by rigging bids, allocating customers, and fixing the price for liquid aluminium sulphate sold to municipalities and paper companies in the United States.⁵⁶ According to court documents, the executive and his co-conspirators agreed not to pursue each other's historical customers, and submitted intentionally losing bids to effectuate those agreements.⁵⁷ As of January 2018, two other individuals and one company had pleaded guilty to charges arising out of the federal investigation of collusion in the liquid aluminium sulphate industry.⁵⁸

ii Trends, developments and strategies

The new DOJ Antitrust Division leadership continued its focus on the prosecution of responsible individuals. The DOJ believes such convictions and pleas are likely to have strong deterrent effects as the average number of individuals sentenced to jail and the average length of sentences continue to increase. A number of prosecutions and guilty pleas secured in 2018 were still connected to investigations that were initiated under prior leadership, such as *LIBOR*, *Automotive Parts*, *Electrolytic Capacitors* and *Real Estate Foreclosure*. While the activity in these investigations has declined from its peak, it would not be surprising for additional charges in these investigations to be filed into 2019. Given the emphasis the DOJ has placed on large international collusion investigations in the past, it would also not be surprising to see the DOJ announce new international investigations in the coming year.

iii Outlook

The DOJ investigations and criminal antitrust prosecutions will likely continue at a high volume in 2019, particularly in areas that appear to align with the current administration's enforcement priorities. The DOJ has stated that a number of relatively new investigations (e.g., *Generic Pharmaceuticals*, *E-commerce*, *Defence Fuel Supply*, *Freight Forwarding* and *Anti-Poaching*) remain ongoing, suggesting that further charges may emerge out of those spheres.

54 See footnote 52.

55 *U.S. v. Kemp & Assoc.*, No. 16-cr-403 (D. Utah 21 February 2019).

56 Press release, 'Former Executive Admits Guilt in Antitrust Conspiracy Affecting Water Treatment Chemicals', available at <https://www.justice.gov/opa/pr/former-executive-admits-guilt-antitrust-conspiracy-affecting-water-treatment-chemicals>.

57 Id.

58 Id.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Market allocation

In June 2015, the DOJ and the State of Michigan filed suit in Michigan against four hospital systems. The case alleged that the systems illegally made a ‘gentlemen’s agreement not to market services’.⁵⁹ Three of the four systems settled, but the fourth is litigating.⁶⁰ The case was initially scheduled to go to trial in April 2017.⁶¹ In June 2017, Judge Judith E Levy, of the US District Court for the Eastern District of Michigan, denied cross motions for partial summary judgment.⁶² After several delays, trial was scheduled for March 2018. In the interim, the case was referred to mediation,⁶³ and in February 2018 the parties settled the case in the form of a proposed final judgment. Among other things, the settlement prohibits the hospital system from entering into any agreement with any other hospital system that prohibits or limits marketing or otherwise allocates any service, customer, or geographic market. The settlement also requires the hospital system to appoint an antitrust compliance officer.⁶⁴

Separately, in April 2018, following a public comment period, the FTC approved a negotiated final order prohibiting Oregon Lithoprint Inc from making or attempting to make any agreement to refuse publication of legal notices or to allocate customers who wish to publish these notices. According to the FTC’s complaint, Oregon Lithoprint, Inc, the owner of the Yamhill, *Oregon News-Register*, a bi-weekly community newspaper, invited *The Newberg Graphic*, its closest rival in Yamhill County, to divide geographic markets for printing foreclosure notices, thereby inviting collusion that endangered competition and violated Section 5 of the FTC Act.⁶⁵

In a potentially significant case concerning online advertising, the FTC issued an opinion, affirming the initial decision of an Administrative Law Judge, that 1-800 Contacts, the largest online retailer of contact lenses in the US, unlawfully entered into anticompetitive agreements with rival online contact lens sellers that suppressed competition in certain online search advertising auctions, thereby restricting truthful and non-misleading internet advertising to consumers. According to the administrative complaint filed by the FTC, as part of a settlement of a trademark dispute, 1-800 Contacts entered into bidding agreements with at least 14 competing online contact lens retailers providing that they would not bid against one another in certain search advertising auctions. The major online search engine

59 Compl., *United States v. Hillsdale Cmty. Health Center, et al*, No. 15-cv-12311 (E.D. Mich. 25 June 2015).

60 Press release, ‘Justice Department Sues Four Michigan Hospital Systems for Unlawfully Agreeing to Limit Marketing for Competing Healthcare Services’ (25 June 2015), available at www.justice.gov/opa/pr/justice-department-sues-four-michigan-hospital-systems-unlawfully-agreeing-limit-marketing.

61 Division Update Spring 2016, U.S. Dep’t of Justice, Division and State of Michigan Sue to Stop Anticompetitive Agreement to Limit Advertising (11 April 2016), available at www.justice.gov/atr/division-operations/division-update-2016/division-and-state-michigan-sue-stop-anticompetitive-agreement-limit-advertising.

62 *U.S. v. W.A. Foote Mem’l Hosp.*, No. 15-cv-12311, 2017 WL 3128102 (E.D. Mich. 31 May 2017).

63 *Id.*, Order (Dkt. 119) (21 January 2018).

64 *Id.*, Notification of Settlement (Dkt. 122) (9 February 2018); see also Statement, U.S. Dep’t of Justice, Justice Department Reaches Settlement with Henry Ford Allegiance Health on Antitrust Charges (9 February 2018), available at <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-henry-ford-allegiance-health-antitrust-charges>.

65 See *In the Matter of Oregon Lithoprint, Inc*, No. C-4645 (24 April 2018), available at https://www.ftc.gov/system/files/documents/cases/161_0230_c4645_oregon_lithoprint-news-register_complaint.pdf.

companies, such as Google and Bing, sell advertising space on their search engine results pages through computerised auctions.⁶⁶ Following a 19-day administrative hearing involving testimony from 43 witnesses and more than 1,250 exhibits, Chief Administrative Law Judge Michael D Chappell issued an initial decision holding that the advertising restraints at issue unreasonably harmed competition and costumers in the market for the sale of contact lenses online.⁶⁷ Respondents appealed and the Commission issued at 59-page opinion upholding Judge Chappell's initial decision. The Commission's order requires 1-800 Contacts to cease and desist from enforcing the unlawful provisions in its existing agreements and from entering into similar agreements in future.⁶⁸ In December 2018, 1-800 Contacts applied to the Commission to stay its order in part pending review by a US Court of Appeals, and that application remains pending.⁶⁹

Steering restrictions

The DOJ's civil antitrust lawsuit against Carolinas HealthCare System (CHS) appears likely to settle soon. In June 2016, the DOJ filed suit against CHS accusing it of improperly using its market share in the Charlotte, North Carolina, area to prevent commercial health insurers from steering patients to lower-cost hospitals. CHS is the largest healthcare system in North Carolina and one of the largest not-for-profit healthcare systems in the United States.⁷⁰ In August 2016, CHS moved for judgment on the pleadings and in March 2017, Judge Robert J Conrad, Jr of the US District Court for the Western District of North Carolina denied CHS's motion for judgment on the pleadings.⁷¹ The case was subsequently stayed and, in December 2018, Judge Conrad preliminarily approved a proposed final judgment, which according to his order may be filed and entered by the court on motion of either party or on the court's own action.⁷² The proposed final judgment prohibits CHS from enforcing steering restrictions in its existing contracts with major insurance companies and expressly prohibits steering, requirements of prior approval for the introduction of new benefit plans, requirements that CHS be included in the most-preferred tier of benefit plans, and any actions that penalise, or threaten to penalise, an insurer for providing a steered plan.⁷³

66 See *In the Matter of 1-800 Contacts, Inc.*, No. 9372 (8 August 2016), available at https://www.ftc.gov/system/files/documents/cases/160808_1800contactspt3cmpt.pdf.

67 See *id.*, Opinion of the Commission, at 2 (7 November 2018), available at https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf.

68 See Press release, 'FTC Commissioners Find that 1-800 Contacts Unlawfully Harmed Competition in Online Search Advertising Auctions, Restricting the Availability of Truthful Advertising to Consumers' (14 November 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/11/ftc-commissioners-find-1-800-contacts-unlawfully-harmed>.

69 Application for a Stay Pending Review, *In the Matter of 1-800 Contacts, Inc.*, No. 9372 (10 December 2018), available at https://www.ftc.gov/system/files/documents/cases/121018respondentappstaypendingreviewuscourtappeals593147_.pdf.

70 Press release, Justice Department and North Carolina Sue Carolinas Healthcare System to Eliminate Unlawful Steering Restrictions (9 June 2016), available at www.justice.gov/opa/pr/justice-department-and-north-carolina-sue-carolinas-healthcare-system-eliminate-unlawful.

71 *U.S. v. The Charlotte-Mecklenburg Hospital Auth.*, 248 F. Supp. 3d 720 (W.D.N.C. 2017).

72 *Id.*, Joint Stipulation and Order (Dkt. 92) (14 December 2018).

73 *Id.*, [Proposed] Final Judgment (Dkt. 92-1) (14 December 2018).

'Pay for delay' and 'sham litigation'

The FTC has continued its efforts to prohibit 'pay for delay' settlements, in which brand-name drug manufacturers settle patent infringement suits against potential generic manufacturers by making payments to generic manufacturers as long as the manufacturer remains out of the market for some period of time. As we reported in 2018, following the Supreme Court's decision in *FTC v. Actavis, Inc.*, the FTC was active in prosecuting such agreements and the total number of potential pay-for-delay patent dispute settlements dropped.⁷⁴ In the past two years, however, the FTC's broad interpretation of what constitutes an actionable 'pay for delay' settlement has encountered some judicial resistance.

The FTC has brought antitrust claims against Endo Pharmaceuticals, Inc, the manufacturer of Lidoderm, an anaesthetic and antiarrhythmic, and against Impax Laboratories, Inc, the manufacturer of Opana ER, an extended-release opioid. Although the claims against Endo have settled, the case against Impax was dismissed. In 2016, the FTC filed a complaint against Endo and other pharmaceutical companies alleging that Endo paid the first generic companies that filed for FDA approval to eliminate the risk of competition for the drugs and in violation of the FTC Act.⁷⁵ The enforcement action was the first FTC case challenging an agreement not to market an authorised generic drug – often called a 'no-AG commitment' – as a form of reverse payment.⁷⁶

A court in Philadelphia, however, granted defendants' motion to sever the claims against the several drug companies, causing the FTC to dismiss its complaint against Endo voluntarily. In January 2017, the FTC refiled its complaint in federal court in California and filed a proposed order to resolve the charges. The FTC also refiled charges against Watson Laboratories, Inc, and its former parent, Allergan plc, alleging illegal blocking of a lower-cost generic version of Lidoderm when it entered into a pay-for-delay agreement with Endo. Thereafter Endo agreed to settle the charges in a stipulated order. Under the order, Endo agreed to the appointment of a monitor and agreed not to enter into anticompetitive patent settlements used to delay generic competition.⁷⁷

Additionally, the Commission issued an administrative complaint against Impax Laboratories, Inc for engaging in similar conduct with respect to Opana ER.⁷⁸ In May 2018, an administrative law judge dismissed the FTC's complaint against Impax. Chief

74 Press release, 'FTC Report on Drug Patent Settlements Shows Potential Pay-for-Delay Deals Decreased Substantially in the First Year Since Supreme Court's Actavis Decision' (13 January 2016), available at www.ftc.gov/news-events/press-releases/2016/01/ftc-report-drug-patent-settlements-shows-potential-pay-delay; FTC, Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (1 November 2017), available at www.ftc.gov/system/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-modernization/overview_of_fy_2015_mma_agreements_0.pdf.

75 *F.T.C. v. Endo Pharmaceuticals Inc, et al.*, No. 2:16-cv-01440-PD, 2016 WL 1253815 (E.D. Pa. 30 March 2016), available at www.ftc.gov/system/files/documents/cases/160331endocmpt.pdf.

76 Press release, 'FTC Sues Endo Pharmaceuticals Inc and Others for Illegally Blocking Lower-Cost Generic Versions of the Branded Drugs Opana ER and Lidoderm', available at www.ftc.gov/news-events/press-releases/2016/03/ftc-sues-endo-pharmaceuticals-inc-others-illegally-blocking-lower.

77 Press release, 'Federal Trade Commission Approves Appointment of Monitor in Pay-for-Delay Case against Endo Pharmaceuticals Inc.' (11 July 2017), available at www.ftc.gov/news-events/press-releases/2017/07/federal-trade-commission-approves-appointment-monitor-pay-delay.

78 Press release, 'Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges; FTC Refiles Suits Against Generic Defendants', available at www.ftc.gov/news-events/press-releases/2017/01/endo-pharmaceuticals-inc-agrees-abandon-anticompetitive-pay-delay.

Administrative Law Judge D Michael Chappell concluded that the FTC had failed to prove that the agreement between Impax and Endo violated the FTC Act. Having found it unlikely that generic manufacturers would have been able to enter the market earlier absent the challenged agreement, the magnitude and extent of any anticompetitive harm was theoretical. The FTC's complaint counsel has filed a notice of appeal seeking a full review by the FTC.⁷⁹

Likewise, the District Court of Delaware dismissed the FTC's action against Shire ViroPharma Inc. In February 2017, the FTC filed a complaint in federal district court charging the company with violating the antitrust laws by abusing government processes to delay generic competition to its branded prescription drug, Vancocin HCl Capsules, which are used to treat diarrhoea associated with bacterial infection. According to the FTC's complaint, between 2006 and 2012, ViroPharma made 43 'sham' filings with the US Food and Drug Administration (FDA) and filed three lawsuits against the FDA to delay the FDA's approval of generic Vancocin Capsules and to exclude competition. The FTC alleged that ViroPharma failed to provide any clinical data to support the arguments advanced in its filings.⁸⁰ In September 2018, District Judge Richard Andrews dismissed the case on grounds that the FTC lacked authority to bring the proceedings absent allegations that VioPharma's conduct violated, or was about to violate, the law.⁸¹ In April 2018, the FTC appealed to the Court of Appeals for the Third Circuit, which heard oral argument this past December.⁸²

In the FTC's case against pharmaceutical company AbbVie, Inc, however, the District Court for the Eastern District of Pennsylvania ruled that AbbVie had used so-called 'sham litigation' illegally to maintain its monopoly over Androgel, a testosterone replacement drug, and ordered US\$448 million in monetary relief to consumers who were overcharged for Androgel as a result of AbbVie's conduct. The FTC filed its complaint in 2014 alleging that AbbVie and Besins Healthcare Inc had illegally blocked consumers' access to lower-cost generic alternatives to Androgel by filing baseless patent infringement lawsuits against potential generic competitors.⁸³ AbbVie has appealed to the Third Circuit.⁸⁴

Relatedly, the FTC responded to the FDA's request for comment on its revised draft guidance aimed at deterring pharmaceutical companies from abusing the citizen petition process to delay approval of and competition from generic drugs. The FTC, referring to its case against Shire ViroPharma, expressed concerns about patient access to lower-cost drugs and a readiness to work closely with the FDA on citizen-petition abuse and other issues that may harm competition.⁸⁵

79 Press release, 'Administrative Law Judge Dismisses FTC Antitrust Complaint Against Generic Pharmaceutical Company Impax Laboratories, Inc.', available at <https://www.ftc.gov/news-events/press-releases/2018/05/administrative-law-judge-dismisses-ftc-antitrust-complaint>.

80 Press release, 'FTC Charges that Shire ViroPharma Inc. Abused Government Processes through Serial, Sham Petitioning to Delay Generics and Maintain its Monopoly over Vancocin HCl Capsules' (7 February 2017), available at www.ftc.gov/news-events/press-releases/2017/02/ftc-charges-shire-viropharma-inc-abused-government-processes.

81 *FTC v. Shire ViroPharma Inc*, No. 17-131-RGA, 2018 WL 1401329, at *2-6 (D. Del. 20 March 2018).

82 *FTC v. Shire ViroPharma Inc*, No. 18-1807 (3d Cir. 2018).

83 *FTC v. AbbVie Inc, et al.*, 329 F. Supp. 3d 98 (E.D. Pa. 2018).

84 *FTC v. AbbVie Inc, et al.*, No. 18-2758 (3d Cir. 2018).

85 Press release, 'FTC Submits Comment on FDA Guidance Aimed at Deterring Abuse of Citizen Petition Process', available at <https://www.ftc.gov/news-events/press-releases/2018/12/ftc-submits-comment-fda-guidance-aimed-deterring-abuse-citizen>. See also FTC, Federal Trade Commission Comment on the Food and Drug Administration's Revised Draft Guidance on Citizen Petitions, available at

Vertical restraints

Payment card acceptance rules

In June 2018, the US Supreme Court decided *Ohio v. American Express Co*, holding that American Express's so-called anti-steering provisions in its merchant contracts, which allegedly prohibit merchants from avoiding fees by discouraging customers' card use at the point of sale, do not violate federal antitrust law.⁸⁶ American Express, like other credit-card companies, provides services to two different groups – cardholders and merchants – who use the credit-card companies to intermediate between them. In such two-sided markets, it is important to strike a balance in the prices charged to the parties on each side of the transaction. American Express, unlike its competitors Visa and Mastercard, provides better rewards to encourage consumer spending rather than focusing on consumer lending. To fund investments in its rewards programme, American Express charges merchants higher fees than Visa and Mastercard. To avoid these higher fees, merchants sometimes attempt to dissuade customers from using American Express. To counteract this tendency, American Express places anti-steering provisions in its contracts with merchants. The United States and several states sued American Express claiming that its anti-steering provisions violated Section 1 of the Sherman Antitrust Act.

In the proceedings below, the DOJ prevailed in the trial court in its antitrust challenge to certain 'non-discrimination provisions' in American Express's merchant acceptance agreements. The district court found after trial that the specific challenged rules had anticompetitive effects by, among other things, allowing American Express to charge supra-competitive rates to merchants and that American Express had failed adequately to prove countervailing pro-competitive justifications.⁸⁷ The court treated the credit-card market as two separate markets – one for merchants and one for cardholders – and found that American Express's anti-steering provisions were anticompetitive because they resulted in higher merchant fees.

American Express appealed to the United States Court of Appeals for the Second Circuit, which reversed and remanded the case with instructions for the court to enter judgment in favour of American Express. According to the appellate court, the government failed to demonstrate that American Express possessed sufficient market power to affect competition adversely in the relevant market, which the appellate court defined as the market for cardholders generally as opposed to the narrower, more specific market for network services that the district court employed.⁸⁸

The Supreme Court held that the both sides of the two-sided credit-card market – merchants and cardholders – had to be considered. The Court went on to hold that evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that

https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-comment-food-drug-administrations-revised-draft-guidance-industry-entitled/p013510_ftc_comment_regarding_fdas_revised_draft_guidance_12-3-18.pdf

86 *Ohio, et al. v. American Express Co.*, 585 U.S. --, 138 S.Ct. 2274 (2018).

87 *US v. American Express Co*, No. 10-cv-04496, 2015 WL 728563 (19 February 2015 E.D.N.Y.).

88 *US v. American Express Co*, 838 F.3d 179 (2d Cir. 2016).

the alleged anticompetitive practice increases the cost of credit-card transactions generally above a competitive level, reduce the number of credit-card transactions, or otherwise stifle competition in the two-sided credit card market.⁸⁹

ii Trends, developments and strategies

Under President Trump the FTC and the DOJ, albeit perhaps to a lesser extent than the FTC, have continued to pursue restrictive agreements. As expected, the FTC remained vigilant in its policing of ‘pay for delay’ settlements and the related abuse of sham petitioning. The far-reaching implications of the Supreme Court’s decision in *Actavis*, although decided in 2013, are still being determined in ongoing court cases, including those directly related to ‘pay for delay’ as well as the rule-of-reason more generally, as the *1-800 Contacts* case demonstrates.

In addition, in the area of patent law and dominance, the head of the Antitrust Division of the DOJ, in several recent speeches, has expressed his view ‘why an antitrust cause of action premised on a failure to abide by FRAND [fair, reasonable and non-discriminatory patent licensing] commitments would be inconsistent with Section 2 of the Sherman Act.’ Instead, he suggested that such disputes are properly the province of contract law. FRAND licensing commitments are often made by patent holders when their patents are incorporated into technology standards set by standard-setting organisations. In certain cases, licensees have brought Section 2 monopolisation actions wherein they allege – as evidence of exclusionary or predatory conduct – that patent holders have failed to live up to alleged FRAND commitments or allegedly deceived the standards organisation ‘by making a commitment to license on FRAND terms when [they] purportedly never had any intention of granting such a license.’ Noting the threat of treble damages under the antitrust laws, he stated: ‘It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act . . . [and to so allow] would contravene the underlying policies of the antitrust’ and patent laws, which include ‘increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.’⁹⁰ The DOJ has begun to file statements of position in private litigations raising these issues. We will watch with interest to see how these cases develop in light of the DOJ’s expressed views. The FTC, for its part, may take a different view on these issues. It continues to litigate a case against Qualcomm concerning certain of its patent licensing practices. The bench trial in that case concluded at the end of January, but a decision has not yet been issued.

iii Outlook

As we anticipated last year, the agencies have continued to pursue civil non-merger investigations of potentially anticompetitive conduct, but the full implications of the cases brought by the FTC, many of which are on appeal, will depend on the rulings of the appellate courts. In particular, the FTC’s broad interpretation of ‘pay for delay’ and ‘sham petitioning’ is now subject to multiple appeals. Likewise, the *1-800 Contacts* decision may have far-reaching implications, and may presage further developments in the FTC’s policing of anticompetitive conduct on the internet, but it remains to be seen whether the Commission’s opinion will

89 *Ohio et al. v. American Express Co.*, 138 S.Ct. at 2287-90.

90 Makan Delrahim, Antitrust Law and Patent Licensing in the New Wild West (18 September 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>.

be upheld. Although it may be some time before these cases are finally adjudicated, for now at least the Supreme Court's decision in *Ohio v. American Express* has established how lower courts will apply the rule of reason in cases involving two-sided markets.

IV MERGER REVIEW

2018 was another active year for the DOJ and FTC in merger review and enforcement. Both agencies investigated numerous proposed acquisitions and required divestitures or sued to enjoin several transactions. Perhaps most notably, the DOJ lost its bid to block AT&T's acquisition of Time Warner. The FTC prevailed in securing injunctions against mergers in the paint pigment industry and the marine water treatment products industry. In addition, both the DOJ and FTC settled several challenges with consent decrees.

i Significant cases

Litigated merger challenges

AT&T and Time Warner

On 20 November 2017, the DOJ filed suit to block AT&T's acquisition of Time Warner. The DOJ alleged that AT&T, a video programming distributor, 'would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks, and it would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers'.⁹¹ AT&T and Time Warner argued that the proposed merger 'is a procompetitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace'; that 'no competitor will be eliminated by this merger'; and that the 'transaction is . . . a classical vertical deal, combining ... content with . . . distribution platforms so that the merged company can compete more effectively against market-leading cable incumbents and insurgent tech giants'.⁹² On 12 June 2018, the judge hearing the case denied the DOJ's request for an injunction.⁹³ In his opinion, the district judge wrote that the government did not meet its burden of showing, among other things, that Time Warner would be able to increase its bargaining leverage in negotiations for the carriage of its networks on rival video distribution systems.⁹⁴ On 26 February, the United States Court of Appeals for the District of Columbia Circuit held that the DOJ failed to show that the district court clearly erred in denying the government's request for a permanent injunction to block the AT&T/Time Warner merger.⁹⁵

Tronox Limited and Cristal USA Inc

In December 2017, the FTC filed an administrative complaint seeking to block Tronox's acquisition of Cristal USA Inc. According to the complaint, the merger 'would combine two of the three largest producers of titanium dioxide . . . manufactured through the chloride process . . . in the United States and Canada'.⁹⁶ Titanium dioxide 'is an essential pigment

91 Complaint, *US v. AT&T Inc*, Case No. 17-cv-02511 (DDC 20 November 2017).

92 Answer, *US v. AT&T Inc*, Case No. 17-cv-02511 (DDC 28 November 2017).

93 *U.S. v. AT&T Inc*, No. 17-cv-2511 (DDC 12 June 2018).

94 *Id.* at 68-149.

95 *US v. AT&T Inc*, No. 18-5214 (DC Cir 28 February 2019).

96 Complaint, *In the Matter of Tronox Limited, et al*, FTC Docket No. 9377 (5 December 2017), Paragraph 1.

used to add whiteness, brightness, and opacity to paints, industrial and automotive coatings, plastics, and other specialty products'.⁹⁷ The FTC's complaint alleges that the merger, if it were allowed to proceed, would both increase the likelihood for coordination and may lead to a reduction in output – two possible anticompetitive effects.⁹⁸

In a break from typical practice, the FTC did not seek relief in federal court in the *Tronox* case simultaneous with commencing an administrative proceeding, citing an ongoing investigation at the European Commission (EC) pending which the parties could not close the transaction.⁹⁹ Instead, the FTC held an administrative trial in the spring of 2018. However, once the EC conditionally cleared the transaction,¹⁰⁰ the FTC filed suit for an injunction in federal district court, as the administrative action was still pending.¹⁰¹

In September 2018, the federal district judge hearing the suit issued an injunction, holding that 'chloride-process TiO₂ sold in North America' is the proper relevant market. The judge excluded 'sulfate-process TiO₂' – which defendants argued should be included – citing 'the economic realities of the industry, as described by TiO₂ producers and consumers, and the evidence presented by the expert economists,' including 'a lack of significant interchangeability between chloride and sulfate TiO₂.' The judge was not convinced by defendants' argument that both types of TiO₂ were in the same market because their prices tended to move together, holding that 'the mere fact that the prices of two goods move upward or downward together need not mean that they are substitutes.' However, in finding the geographic market to be limited to North America, the court noted, among other things, the divergence between prices in North America and Europe. After defining the relevant market, the court held that the FTC met its burden in demonstrating that the proposed transaction would increase market concentration and likely lead to a reduction in output; and that the defendants' arguments concerning future market entry and transaction-related efficiencies did not overcome the FTC's *prima facie* case.¹⁰²

In December 2018, the FTC's in-house administrative law judge also sided with the FTC and found that the proposed acquisition 'may substantially lessen competition in the relevant market for the sale of chloride TiO₂ in North America, by creating a highly concentrated market and increasing the likelihood of coordinated effects.' Similar to the district judge, Judge D Michael Chappell found that chloride TiO₂ is the relevant product market and North America is the relevant geographic market. The administrative law judge cited a litany of evidence which he found established the 'distinct characteristics' of chloride TiO₂ as compared to sulphate TiO₂, including its relative brightness, usage by manufacturers, the form in which it is sold and price differential. The judge also cited regional pricing differences, among other things, in holding that North America was the relevant geographic market; this is also in line with the district judge's earlier ruling. The judge went on to find that the proposed acquisition would raise concentration in the relevant market to a level such that the transaction is 'presumptively anticompetitive' and that 'anticompetitive coordinated

97 Id. Paragraph 14.

98 Id. Paragraphs 42–54.

99 See Shawn Tully, 'Is Trump's Antitrust Policy Pro-U.S. Business? A New FTC Action Casts Doubt', *Fortune*, 31 January 2018, available at <http://fortune.com/2018/01/31/is-trumps-antitrust-policy-pro-u-s-business-a-new-ftc-action-casts-doubt/>.

100 See Press release, 'Mergers: Commission approves Tronox's acquisition of Cristal, subject to conditions', available at http://europa.eu/rapid/press-release_IP-18-4361_en.htm.

101 Scheduling Order, *In the Matter of Tronox Limited, et al*, FTC Docket No. 9377 (20 December 2017).

102 *FTC v. Tronox Ltd.*, No. 18-cv-01622 (D.D.C. 12 September 2018).

effects are in fact likely.’ Finally, the judge found that, contrary to the respondents’ arguments, entry by alternate producers was not likely, nor were ‘claimed cost savings [resulting from the acquisition] cognizable.’¹⁰³

Abandoned transactions

Wilb. Wilhelmsen and Drew Marine

In July 2018 a federal court granted the FTC’s motion for preliminary injunction which blocked the *Wilhelmsen/Drew Marine* merger and which led the parties to abandon the transaction. The court found that the FTC had met its burden in demonstrating that it would be likely to succeed in proving that the proposed transaction may substantially reduce competition in the market for ‘the supply of marine water treatment products and services to Global Fleet Customers’. In so holding, the court approved of the FTC’s use of ‘cluster markets’, which group similar products and services together ‘for analytical convenience’. The court also accepted the FTC’s definition of the market with reference to customers with particular characteristics.¹⁰⁴

J.M. Smucker Co and Conagra Brands, Inc

In March 2018, the FTC announced that it had initiated administrative proceedings to halt J.M. Smucker Co’s proposed acquisition of Conagra Brands, Inc, citing the likelihood of a substantial lessening of competition in the market for canola oil and vegetable oils.¹⁰⁵ A day after the announcement of the initiation of these proceedings, the parties to the deal announced that they would abandon the transaction.¹⁰⁶

Divestiture and conduct remedies

The DOJ required divestitures in several proposed mergers, including:

- a United Technologies Corporation and Rockwell Collins (divestiture of certain aerospace businesses);¹⁰⁷
- b CVS Health Corporation and Aetna Inc (divestiture of a certain prescription health insurance plan business);¹⁰⁸
- c Gray Television Inc and Raycom Media Inc (divestiture of certain television stations);¹⁰⁹

103 Initial Decision, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (14 December 2018).

104 *FTC v. Wilb. Wilhelmsen Holding ASA*, No. 18-cv-00414 (D.D.C. 1 October 2018).

105 Press release, ‘FTC Challenges Proposed Acquisition of Conagra’s Wesson Cooking Oil Brand by Crisco owner, J.M. Smucker Co.’, available at <https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil>.

106 See Press release, ‘Statement of Ian Conner, Deputy Director of FTC Bureau of Competition, on J.M. Smucker Co.’s Decision to Drop Proposed Acquisition of Conagra Brands, Inc.’, available at <https://www.ftc.gov/news-events/press-releases/2018/03/statement-ian-conner-deputy-director-ftc-bureau-competition-jm>.

107 Press release, ‘Justice Department Requires UTC to Divest Two Aerospace Businesses to Proceed with Acquisition of Rockwell Collins’, available at <https://www.justice.gov/opa/pr/justice-department-requires-utc-divest-two-aerospace-businesses-proceed-acquisition-rockwell>.

108 Press release, ‘Justice Department Requires CVS and Aetna to Divest Aetna’s Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger’, available at <https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d>.

109 Press release, ‘Justice Department Requires Divestitures to Resolve Antitrust Concerns in Gray’s Merger With Raycom’, available at <https://www.justice.gov/opa/pr/justice-department-requires-divestitures-resolve-antitrust-concerns-gray-s-merger-raycom>.

- d* The Walt Disney Company and Twenty-First Century Fox, Inc (divestiture of regional sports television networks);¹¹⁰ and
- e* Bayer AG and Monsanto Company (divestiture of various seed businesses and an herbicide business).¹¹¹

The FTC similarly required divestitures in a number of deals, including:

- a* Penn National Gaming and Pinnacle Entertainment (divestiture of certain casinos);¹¹²
- b* Linde AG and Praxair Inc (divestiture of various businesses or plants related to 'nine industrial gases product markets in numerous geographic markets in the United States');¹¹³
- c* Amneal Pharmaceuticals LLC and Impax Laboratories Inc (divestiture of certain generic pharmaceutical products);¹¹⁴ and
- d* Grifols SA and Biotest US Corporation (divestiture of certain blood plasma collection centres).¹¹⁵

In addition, the FTC required the restructuring of a joint venture in a transaction involving the acquisition of a polyethylene terephthalate (PET) resin production facility. Here, three entities that formed a joint venture to acquire an under-construction facility to produce PET resin used in the manufacture of bottles and food packaging 'agreed to restructure their transaction and to accept certain other conditions'. According to the FTC, the parties agreed to a consent order the provisions of which will 'prevent [them] . . . from using their joint ownership of the assets to act alone or in concert to exercise market power, or to transmit competitively sensitive information beyond what is necessary to accomplish the legitimate purposes of the joint venture'. The FTC's decision and order will require, among other things, that the co-venturers do not acquire more than one-third of the joint venture, and that the plant operate as a 'tolling' facility whereby the venturers will supply their own inputs to the manufacturing process run by the plant. The under-construction plant was purchased

110 Press release, 'The Walt Disney Company Required to Divest Twenty-Two Regional Sports Networks in Order to Complete Acquisition of Certain Assets from Twenty-First Century Fox', available at <https://www.justice.gov/opa/pr/walt-disney-company-required-divest-twenty-two-regional-sports-networks-order-complete>.

111 Press release, 'Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto', available at <https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened>.

112 Press release, 'FTC Requires Casino Operators Penn National Gaming, Inc. and Pinnacle Entertainment, Inc. to Divest Assets in Three Midwestern Cities as a Condition of Merger', available at <https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-casino-operators-penn-national-gaming-inc-pinnacle>.

113 Press release, 'FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger', available at <https://www.ftc.gov/news-events/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc>.

114 Press release, 'FTC Requires Generic Drug Marketers Amneal Pharmaceuticals LLC and Impax Laboratories Inc. to Divest Rights to 10 Generic Medications as Condition of Merger', available at <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-requires-generic-drug-marketers-amneal-pharmaceuticals-llc>.

115 Press release, 'FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation', available at <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest>.

out of bankruptcy, and the FTC noted that '[c]ompletion of this more efficient facility will significantly expand PET and PTA [a related product] capacity and output in North America, benefiting consumers.'¹¹⁶

The FTC also required that Northrop Grumman agree 'to supply solid rocket motors, or SRMs, to competitors on a non-discriminatory basis' and to erect a firewall around its SRM business in order for it to proceed with its acquisition of Orbital ATK, Inc.¹¹⁷ According to the FTC, SRMs 'propel missiles to their intended targets and are an essential input for missile systems'.¹¹⁸

ii Trends, developments and strategies

Merger enforcement remains robust and the agencies continue to focus on thorough investigation of the matters before them. The agencies say they will seek to tailor divestitures to address their competitive concerns, and will not shy from challenging transactions that are unable to be remedied by divestitures.

Notably, in 2018, the DOJ announced reforms to its merger review process designed to decrease the time it takes the DOJ to investigate transactions. Pursuant to these reforms, the DOJ will generally aim to complete investigations within six months of filing.¹¹⁹ Consistent with its view that divestiture remedies are highly preferred and conduct (or 'behavioural') remedies are disfavoured, the DOJ also withdrew its 2011 Policy Guide to Merger Remedies and will release an updated policy. In the meantime, the 2004 Policy Guide has been reinstated. The now-withdrawn Policy Guide contained a significant discussion of conduct remedies, whereas the currently-effective guide notes that 'structural merger remedies are strongly preferred to conduct remedies'.¹²⁰

iii Outlook

We expect the agencies to continue to devote substantial resources to merger investigations. We will watch with interest to see whether the DOJ's recent process reforms will lead to a noticeable reduction in the time it takes for it to complete these investigations. Moreover, we note that issues surrounding the potential competitive effects of vertical mergers have been gaining increased attention, particularly among certain FTC commissioners. We will therefore be quite interested to see how the agencies address these types of mergers in the coming years.

116 Press release, 'FTC Imposes Conditions in Joint Venture among Three Producers of PET Resin,' available at <https://www.ftc.gov/news-events/press-releases/2018/12/ftc-imposes-conditions-joint-venture-among-three-producers-pet>.

117 Press release, 'FTC Imposes Conditions on Northrop Grumman's Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.', available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket>.

118 *Id.*

119 See Makan Delrahim, *It Takes Two: Modernizing the Merger Review Process* (25 September 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>.

120 Antitrust Division Policy Guide to Merger Remedies (October 2004), available at <https://www.justice.gov/atr/antitrust-division-policy-guide-merger-remedies-october-2004>.

V CONCLUSIONS

We expect the agencies' resources will continue to be devoted to merger enforcement and cartel investigations and prosecutions. The FTC's hearings on competition and consumer protection in the 21st century will conclude this year, and we will watch with interest to see how the issues discussed at those hearings might inform the FTC's enforcement action in the years to come. We also anticipate seeing how the DOJ will continue to influence competition policy, including possibly by making filings in private litigations concerning issues such as patent licensing, and alleged employee 'no-poach' agreements – actions that it has already begun to take.

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